

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 13-1264

-VS-

DEPARTMENT; CITY OF GARFIELD; :

GARFIELD POLICE DEPARTMENT; :

OFFICE OF THE NEW JERSEY STATE :

MEDICAL EXAMINER; ETERNITY FUNERAL :

SERVICES, LLC; ZHONGXUE HUA, M.D., :

Ph.D; MONICA CALDERON, :

: MOTIONS

Defendants. :

Newark, New Jersey
March 12, 2014 10:30 a.m.

B E F O R E:

THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

s\ RALPH F. FLORIO
Official Court Reporter

U.S. DISTRICT COURT, NEWARK, NEW JERSEY 07101

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1 THE COURT: Good morning.

2 All right, we're here in the matter of Zdenka
3 Simkova versus City of Newark and other institutional
4 defendants and two individual defendants. When you're
5 putting in your appearances on the record, counsel, indicate
6 on the defense side which entities/persons you represent.

7 First from the plaintiff.

8 MR. BRISKIN: Good morning, your Honor. Peter
9 Briskin from the law firm of Fishbeyn & Briskin, representing
10 Ms. Zdenka Simkova, and to my right is my associate Thomas
11 Lamb, also from my office.

12 THE COURT: Okay. Thank you. Welcome.

13 MR. DEFURIA: Good morning, your Honor. Joseph
14 DeFuria, from the law firm of Gaccione Pomaco, We represent
15 the City of Garfield and the City of Garfield Police
16 Department.

17 THE COURT: Thank you.

18 MR. DEFURIA: Thank you.

19 MR. LIPSHUTZ: Good morning, your Honor. Gary
20 Lipshutz, Assistant Corporation Counsel for the City of
21 Newark and its Police Department.

22 THE COURT: Thank you.

23 MR. MURPHY: Good morning, your Honor. Robert
24 Murphy, Deputy Attorney General on behalf of the Office of
25 the New Jersey State Medical Examiner.

1 MR. HO: Good morning, your Honor. Kenneth Ho, for
2 Sue Pasterilli (ph), we represent Eternal Funeral Services
3 LLC.

4 THE COURT: So who represents the individual
5 defendants? There's no proof of service on the form-- have
6 they moved?

7 MR. MURPHY: Your Honor, I know there are two
8 former-- one former and one current medical examiner employee
9 which has not been served.

10 THE COURT: Counsel?

11 MR. BRISKIN: Your Honor, it is my understanding
12 that one of them was served as I understand. I have to check
13 my office for the Affidavit of Service, on Monica Calderon.
14 The other individual defendant was unable to be served.

15 THE COURT: So we are doing what with him? Are we
16 entering a default-- what are we doing?

17 MR. BRISKIN: Entering a default or dismissal-- I'm
18 sorry. What are we doing with him?

19 THE COURT: Are you abandoning him as a defendant?

20 MR. BRISKIN: The other thing is that we did not
21 get any discovery as to his whereabouts from the defendant
22 state. We just received responses yesterday. I'm not sure
23 if we asked for his location in order to serve him. But I
24 need to review that and I only received that yesterday.

25 THE COURT: All right, at the end of this argument

1 I'll have directions for counsel so that the docket is
2 properly attended to. Because right now we have two named
3 individuals who have no identity on the record, there's no
4 proof of services to one. The proof of services to the other
5 hadn't been filed and there's no appearance-- as to the one
6 that has been served, etc, etc, I will let counsel know what
7 we need to do with that, okay.

8 MR. BRISKIN: Understood.

9 THE COURT: Okay. All right.

10 Counsel, let's move now to the arguments. And the
11 Court is aware of motions having been filed on behalf of the
12 institutional defendants, each moving defendant filed a brief
13 and has separate counsel. So who wants to go first?

14 MR. DEFURIA: Maybe since I'm in the first seat,
15 Judge.

16 THE COURT: That's how lawyers think. Come up to
17 the podium.

18 MR. DEFURIA: Thank you, Judge. Good morning, your
19 Honor.

20 THE COURT: Good morning.

21 MR. DEFURIA: Good morning, your Honor. Again,
22 Joseph DeFuria, on behalf of the Garfield Police Department
23 and the City of Garfield.

24 Your Honor, we have made a motion to dismiss under
25 Federal Rule 12(b)(6), alleging that the plaintiff's

1 complaint fails to state a cause of action. I believe for
2 purposes of this motion and in general the facts giving rise
3 to this allegation are undisputed.

4 The allegations appear to center upon an alleged
5 failure on behalf of the City of Garfield, or the Garfield
6 Police Department, in particular, to take a missing person's
7 report from the decedent's mother.

8 THE COURT: Just factually remind me. When saying
9 Ms. Simkova-- is it Simkova?

10 MR. BRISKIN: Yes, Simkova.

11 THE COURT: When Ms. Simkova went to the Garfield
12 Police Department, what date was that, how frequently was she
13 asking to file this report?

14 MR. DEFURIA: According to the complaint, your
15 Honor, it's alleged, I believe, that she came to the Garfield
16 Police Department. I'm going to double check the date. I
17 want to say it's the 23rd of November.

18 THE COURT: I think that's the date of death--
19 isn't it? 11/23?

20 MR. DEFURIA: My understanding, Judge, that there
21 is no documentation of her visit to the City of Garfield. So
22 we're going to have to go with the date alleged by the
23 plaintiff for purposes of today's application. I'm sorry.
24 November 26th is the date that alleges in the complaint to
25 have come to the City of Garfield Police Department.

1 I don't believe there's any specific allegation of
2 any interaction with the City of Garfield itself. I assume
3 the police department is for all intents and purposes within
4 the City of Garfield. But the City of Garfield Police
5 Department is in a separate building than the City of
6 Garfield. And I don't believe that there's any allegation
7 that she went to the City of Garfield either to the clerk or
8 somebody in the municipal office.

9 But anyway, with respect to this claim, Judge, the
10 allegation is essentially that the-- if I may paraphrase it,
11 the City of Garfield failed to train its officers or
12 employees in the proper procedure, to handle and take a
13 missing persons information. And that that somehow was a
14 cause of a deprivation of constitutional rights.

15 In this particular case, Judge, I believe the
16 allegations are that the plaintiff was told that she had to
17 file a missing persons report in the location where the
18 decedent resided. I don't know that to be the case, but I'm
19 going to assume that for purposes of the motion that that was
20 what she was told. There is no specific documentation or
21 records that show that this lady came to the Garfield Police
22 Department.

23 Plaintiff then alleges in its complaint that
24 subsequent to the facts giving rise to this event, there was
25 an enactment of Patricia's law, which was an attempt to

1 codify or to streamline missing person matters.

2 THE COURT: Well, let's even say that there was an
3 attempt to make existing matters better, right.

4 MR. DEFURIA: That's fair. Our position, your
5 Honor, in this case is that the allegation is based solely
6 upon a failure, or alleged failure to train or having in
7 place appropriate procedures to address missing person's
8 reports. And the case law that we rely upon clearly
9 indicates that that in and of itself is potentially a
10 recognizable cause of action under Section 1983 only when
11 that failure amounts to a deliberate indifference to the
12 rights of persons with whom the police would have come into
13 contact with.

14 And I also believe that the cases indicate that
15 there has to be a direct causal link between the policy or
16 custom of the municipality and the alleged deprivation. And,
17 your Honor, the defendants in this case submit that that
18 doesn't exist here. The clearly-- even though the fact
19 pattern before us we have an alleged person that was coming
20 to visit his mother in Garfield doesn't show up. Unbeknownst
21 to the mother this decedent had already been identified, or
22 at least located in the City of Newark and found dead on
23 November 23rd. The City of Garfield had no contact
24 whatsoever with Mr. Simro.

25 THE COURT: Well, I think, at least from my reading

1 of the papers and the complaint, I think that the papers were
2 a little more detailed; had Garfield filed a missing person
3 there would have been at some point a linkup between the
4 medical examiner, Newark, Garfield, and floating to the
5 surface would have been the Simkova family. And at some
6 point, you know, a reunion between the decedent son and mom.
7 And because she had hit a wall with Garfield, this essential
8 link never was established. And it was almost anecdotally
9 that she learned about her boy's death some five years-- or
10 less than five years-- or four years.

11 MR. DEFURIA: Four years and change.

12 THE COURT: Yes, right. So that's where I think
13 that there's this almost sine qua non or post hoc proctor hoc
14 thing. Am I right factually, counsel?

15 MR. BRISKIN: That's about right, your Honor.

16 THE COURT: Yes. Yes. And so that's where they
17 are yoking Garfield in. That it was an essential part, if
18 not the essential part of the chain that-- or that it through
19 the firewall down. So how does that affect the
20 constitutional arguments that are being made here? Because
21 we have to keep in mind, we're not talking about negligence.
22 Are we all happy with that that we're just not talking about
23 negligence?

24 MR. DEFURIA: Absolutely, Judge. I think that you
25 have to look at some of the other cases and see the type of

1 arguments that similarly made that were not deemed to be
2 sufficient.

3 I believe I cited, for example, your Honor, to the
4 matter of Gazette v. the City of Pontiac. Which was a case
5 from 1994, 41-- it's F.3d 1061. In that particular case, a
6 lady filed an action under Section 1983, arising out of her
7 mother's death following an abduction in a car wash. And in
8 that case there was also an allegation that the police
9 department and the City of Pontiac failed to take a missing
10 persons report and investigate further the death, or
11 disappearance rather initially-- of the mother. And there is
12 even some further egregious facts in that case, where not
13 only did the police department not do certain things, but
14 there was proof that the police department actually lied to
15 the family about the extent of their investigation. The
16 contacts that they made. The work that they had been doing
17 to help find the mother. And the court in that case did not
18 find Section 1983 liability to attach to the City of Pontiac
19 and its police department. And it did so, I believe, on two
20 separate analyses.

21 First of all, they talked about whether or not
22 there was any affirmative obligation or duty on behalf of the
23 municipality to do things for its citizens, and the court
24 said, absent some type of special relationship-- and they
25 pointed to things like custody or some other reason why the

1 state would have control over a particular individual that--
2 absent that type of relationship there isn't a general
3 obligation or duty on behalf of the municipality to do things
4 for its residents.

5 So that was one reason why they didn't find
6 liability. And they also addressed and talked about the same
7 type of analyses that was cited in the City of Canton v.
8 Harris case, which talked about inadequate training. And
9 again that court basically delineated in the standard that
10 the failure to train must amount to a deliberate indifference
11 to the rights of a person with whom police come into contact.

12 THE COURT: Well, let's for purposes of applying
13 these cases to ours, let's see if we can come to an agreement
14 on both sides about what exactly the plaintiff is alleging
15 and for how long, and what the nature is as to the police
16 conduct that would bring it within a constitutional liability
17 zone. And I'm going to invite plaintiff's counsel to jump up
18 and say, Judge, you're wrong or you're right, because it will
19 help to just kind of have the argument.

20 Ms. Simkova goes to the Garfield Police Department
21 on the 26th and says, I would like to file a missing police
22 report-- I mean, a missing persons report about my son. He
23 was supposed to come on Thanksgiving and he didn't show up.
24 Correct?

25 MR. BRISKIN: That's correct. I believe she also

1 said a couple of other things that she had tried to reach him
2 and he was unreachable. She told them that she lived in
3 Garfield. And also that he was coming to Garfield.

4 THE COURT: He was going to her house and he didn't
5 show.

6 MR. DEFURIA: May I interject. I also believe that
7 she might have said that she already filed a missing persons
8 report with the City of New York.

9 THE COURT: Had she already done that, counsel?

10 MR. BRISKIN: Your Honor, the timing-- no. I
11 believe what happened was Garfield had told her, being that
12 he did not reside in Garfield-- "where does he reside?" He
13 resides in Queens, goes to Queens, and file the report there.

14 MR. DEFURIA: Well, I'm only using the papers that
15 were submitted by plaintiff. In the statement of facts they
16 state, plaintiff had already filed a missing persons report
17 with the 113th Precinct in Queens, New York, on or about
18 November 22nd. Which would have been four days before she
19 came to Garfield.

20 I don't have any other facts other than what has
21 been submitted in the papers, Judge, and that's why I made
22 that statement.

23 MR. BRISKIN: Your Honor, again, when the client
24 came to me with this issue she did not document the exact
25 days-- when it happened it happened. She came to me about--

1 she came to me it was probably six years it was prior. And
2 that's why we put on or about and I believe in the answers to
3 the discovery demands she committed to, you know, the date
4 being subsequent to coming to Garfield.

5 THE COURT: Okay. But let's not get all, you know,
6 I made a mistake, there are too many lawyers for me to
7 attempt what I'm doing.

8 Temporally, can we agree or is it impossible to
9 agree that the interaction between Ms. Simkova and the
10 Garfield police is that exchange between whomever she spoke
11 to or the passage of information, no, I'm not going to file a
12 missing persons report. I'll even throw in going to New
13 York, because he doesn't live here. And that pretty much
14 ends it; can I draw a box around that?

15 MR. DEFURIA: Yes.

16 MR. BRISKIN: Yes, I think so.

17 THE COURT: Okay, Mr. Lipshutz.

18 MR. LIPSHUTZ: Judge, I'm sorry, just to clear up
19 some facts.

20 In looking at the discovery responses, the New York
21 police report is reported by walk-in November 29th. So that
22 is the day that she-- according to the New York police
23 report, that she went to New York to report the missing
24 person.

25 THE COURT: So we can infer because of what

1 Garfield said. The bottom line is that Garfield said it at
2 the time they interacted with her.

3 MR. DEFURIA: Assuming we know what the date to be
4 what it is and known to be set.

5 THE COURT: Yes. So we draw a circle around
6 Garfield's-- if we are paying actors equity rates to Garfield
7 and we were acting this out, Garfield will have one scene in
8 this drama, correct?

9 MR. BRISKIN: That's correct.

10 MR. DEFURIA: I would agree with that-- limited
11 lines.

12 THE COURT: Okay.

13 And we are going to be applying the constitutional
14 tests of principles and analysis to the import of that
15 interaction as seen through the lens of Canton and Gazette
16 and all the other cases that we have. We don't have a lot of
17 cases, which is a blissful thing for once. But we've got a
18 fairly standard series of legal principles that we have used
19 in other cases, correct?

20 MR. DEFURIA: I would agree with that, Judge.

21 THE COURT: So you're saying there's no deliberate
22 indifference here. Are you also saying that whatever
23 Garfield did it really didn't play a role in the bad stuff
24 that happened?

25 MR. DEFURIA: I think that might be difficult for

1 me to state had no role, Judge. But I certainly don't think
2 that it's the direct causal link between-- and that's what
3 the case law says. That the municipal policy or custom has
4 to be the direct causal link between the alleged
5 constitutional deprivation.

6 In this case, Judge, I don't know what happened
7 with respect to the body. Or what happened with respect to
8 someone else's obligation to identify and notify the next of
9 kin. But Garfield had no obligation, as far as I can see;
10 they never had the body. They never had any information
11 regarding the body. How could they possibly have been the
12 direct causal link between whoever identified this body and
13 what eventually happened to the body? We could go by the
14 allegations in the complaint; the body was identified at some
15 point in time, it was in the possession of City of Newark
16 Police Department, or at least somebody from the City of
17 Newark found the body and probably turned over my guess is to
18 the state medical examiner's office or some other entity. I
19 don't believe the City of Newark takes possession of the body
20 unless it was transported for emergency treatment, which it
21 doesn't appear to have been. And at some point there the
22 lead goes dry. I don't know how it doesn't get to Ms.
23 Simkova.

24 But my point is, somewhere in there I think is the
25 district causal link between a policy and the deprivation.

1 Not an entity who never had possession of a body, never had
2 even any documents in its possession to even identify the
3 body. To say, look, your resident, next of kin was found can
4 you help us locate him-- we don't have any of that. All we
5 have is an allegation, again an allegation, now we find out
6 the date may be not right-- that she comes into the Garfield
7 Police Department. And I don't know why our date has to be
8 right and everybody else the date is wrong. She comes in and
9 says, I want to file a missing persons report. My son never
10 showed up and he lives in New York. And they tell her you
11 have to go to New York or somewhere else. And that's it.

12 I understand we're trying to draw a circle around
13 that. To me, when you look at some of these other cases and
14 when talk about a direct causal link, this isn't it. The
15 direct causal link, if the allegation is my client was, we
16 told you the name of this person and you dropped the ball--
17 you didn't make phone calls and do a data search and go on
18 line and try to find out who Ms. Simkova was-- then I can't
19 stand up and tell you perhaps there was not a direct causal
20 link between our policies and the failure to notify and
21 properly dispose of this body.

22 But I'm not arguing that, Judge. I'm well-removed
23 from that. And I think that's the first hurdle here that I
24 think I have trouble with. It is really-- and I know your
25 Honor mentioned earlier that, you know, we had some import

1 with regard to the firewall coming down and I understand what
2 you're saying. But I don't think that the direct causal link
3 is here. So I stand on that argument first. And I also
4 stand on the second argument.

5 THE COURT: Well, could you also stand on another
6 argument which is, yup, absent our missing person's report--
7 which is the fact a lot of other-- a lot of other information
8 did not get exchanged among the entities that would have in
9 fact developed information almost effortlessly that would
10 have notified her either around the holiday time, or
11 certainly when the medical examiner identified the body and
12 buried it in a mass grave. But acknowledging that my police
13 department's custom, policy, activity etc., is
14 constitutionally okay, because it did not have to assist,
15 change the course of what was going to happen, do anything
16 different to help her, it was doing what it does. Can you
17 say that as well?

18 MR. DEFURIA: Well, I think the other issue to look
19 at is, we know for a fact that the City of New York took a
20 missing persons report and that didn't change the outcome.
21 Okay. It's not that the missing person's report would be
22 unique to New Jersey. I believe that goes into a general
23 data base. Because this individual was identified as living
24 in Virginia. I believe that was the identifier. And this
25 is, again, Judge, some of these documents were produced

1 subsequent to the filings of these motions and I don't want
2 to input--

3 THE COURT: Well, why don't we do something about
4 that. Because Mr. Lipshutz used a kind of an odd word given
5 the fact that this is a motion to dismiss when you referred
6 to the New York Police Report as discovery. Normally we
7 don't talk about discovery in the context of a motion to
8 dismiss.

9 That said, in the plaintiff's opposition briefs
10 documents are attached, correct, counsel?

11 MR. BRISKIN: That's correct, Judge.

12 THE COURT: Right. And I dare say arguably, had
13 you chosen to attach those documents, except for the
14 complaint obviously, but had you chosen to put the medical
15 examiner's stuff for purposes of demonstrating dates or
16 whatever else you were talking about in the complaint, I
17 don't think that the world of civil procedure would have had
18 a seizure and you would have been arrested on the spot by the
19 civil procedure police.

20 So if we have a general cache of documents that are
21 agreed upon as illustrative and might as well have been filed
22 with the complaint, I don't have any problem referring to
23 them, without the horror of turning this into a summary
24 judgment motion or anything else that would be, you know,
25 outcome determinative or put a different standard on this or

1 anything else. The way I view this is really, you don't have
2 a legal reason to be here as opposed to anything else. So
3 it's just the failure to state a cause of action end of
4 story.

5 And it seems to me to that extent we can use the
6 stuff that has been summoned up to develop the facts
7 necessary for that, without converting this to a summary
8 judgment motion because you will still be saying, we need
9 more stuff. If we had more stuff, if we had enough stuff to
10 get us to the more stuff-- am I right about that, counsel?

11 MR. BRISKIN: That's correct, Judge.

12 THE COURT: Okay. I don't know how we fix that in
13 some legally non obnoxious way. But I'm prepared to include
14 these documents without saying, I'm turning this into a
15 summary judgment motion, changing the way in which we're
16 making our arguments, or otherwise feeling anybody's put at a
17 disadvantage. Because we've all been aware of it. And I
18 think Mr. DeFuria began, we're pretty much in accord on what
19 the facts are.

20 So we'll figure out how to do that. But I'm
21 inclined to include the information on this, to the extent
22 that I'm not doing violence to anybody. Is that okay with
23 the plaintiffs if I do that?

24 MR. BRISKIN: Your Honor, I think it's okay. Just
25 as long as they're viewed in the light where there may be

1 more documents from certain defendants.

2 THE COURT: Understood.

3 MR. BRISKIN: Maybe no documents from this
4 defendant and we understand that, your Honor. But that is
5 part of our claim.

6 THE COURT: Right, understood.

7 MR. BRISKIN: And so long as doesn't affect-- and
8 it could be an apportionment of liability eventually at some
9 point, you know as long as that doesn't affect the view of
10 this case.

11 THE COURT: Right. Okay. Mr. Lipshutz, any
12 problem with that? That way the bad word discovery doesn't
13 sound that bad.

14 MR. LIPSHUTZ: I don't, Judge. I think it's
15 valuable to illuminate the issues.

16 THE COURT: Yes. Mr. Murphy.

17 MR. MURPHY: No problem, your Honor.

18 THE COURT: And counsel?

19 MR. HO: None from me, your Honor.

20 THE COURT: Okay. So that's just, you know, like
21 we're trying to cleanup the docket and just kind of making
22 everybody procedurally up on these things and aware of where
23 we're at.

24 So I think I have the argument. I think I have the
25 factual background that we're all pretty much agreed on in my

1 head. And we'll move to another defendant seeing what he has
2 to say.

3 MR. DEFURIA: Thank you for your time, Judge,
4 appreciate it.

5 THE COURT: Thank you.

6 MR. DEFURIA: Give me a second, I brought a little
7 bit more paper up here than I wanted to.

8 THE COURT: Okay.

9 MR. LIPSHUTZ: Sorry, your Honor. Did you want to
10 hear the city's motion or the plaintiff's response?

11 THE COURT: No, I rather have plaintiff talk about
12 everybody. Again, I really think it's healthier for us to be
13 holistic about what each side is saying. And I was thinking
14 as I was reading the briefs that you could have done an
15 omnibus brief if you wanted to. Because everybody has kind of
16 a role. And I thought the complaint very clearly laid out
17 what the story is. So I don't have a problem and I don't
18 think you should with it.

19 MR. BRISKIN: I don't, your Honor, and I agree.

20 MR. LIPSHUTZ: May it please the Court. Thank you,
21 your Honor.

22 Mr. DeFuria stole some of the legal thunder.

23 THE COURT: Well, you let him go first.

24 MR. LIPSHUTZ: I let him go first.

25 THE COURT: Yes.

1 MR. LIPSHUTZ: So obviously I represent the City of
2 Newark. And while I don't necessarily agree with all of the
3 things that Mr. DeFuria has said, I'm going through my
4 presentation.

5 Obviously we know that Mr. Simkova was missing
6 November the 22nd. And we also know that he was discovered
7 on November 23rd. And that we now know that the Newark
8 police were called to the scene. And we know that the
9 medical examiner came to the scene and took away his body.

10 Some of things we don't know. And we don't have
11 all of the documents. They're portions of the Newark
12 investigatory file that have been circulated. But we can't
13 find the actual file. It has been six years. And I know a
14 search was done, but that is sort of off. I want to just
15 give your Honor some background.

16 We know that the body was taken to the medical
17 examiner who did an autopsy and that fingerprint analysis was
18 done, because this was a John Doe body and it didn't have
19 identification. And we know that that fingerprint
20 identification came back to Mr. Simko to an address in, I
21 believe, Virginia. And we also know that the City of Newark
22 called out to the Virginia police to go to that location, to
23 try to locate a next of kin.

24 What we have also learned is that the plaintiff
25 went to-- let's say that she went to Garfield. And then went

1 to the New York City Police Department to file a police
2 missing person's report. We have at least some of that
3 report. And that she went on November 29th. Which is six
4 days after the discovery of Mr. Simkova's body. And that
5 would be, by the way, the first report that would link Ms.
6 Simkova to Mr. Simko. That would be November 29th, when she
7 filed the New York missing person's report. Until that time
8 there's no document saying, hey, this guy is a missing
9 person. That's important.

10 We don't know what New York City did at all. We
11 don't know what they did. We don't know if they inputted any
12 information into any data bases. We don't know anything.
13 Now, I have subpoenaed-- I don't think this is getting off
14 the topic, I just wanted to give your Honor some background.
15 I've subpoenaed New York and I'm waiting to get whatever file
16 they have. But we don't know what they did.

17 THE COURT: Well, for us to worry our pretty little
18 heads about what we know or don't know, it appears that they
19 gotten past the date that you want to close, because we're
20 dealing with a complaint at this point that's making
21 allegations and you're talking about proofs of those
22 allegations.

23 MR. LIPSHUTZ: I'm sorry, I would just like to
24 consider these things in the concept-- I just want to get the
25 facts out there. I will go to my legal argument because--

1 it's important to know what we know.

2 Now, the first question here is this allegation of
3 a due process violation under the Fourteenth Amendment. In
4 the context of a 1983 action. So, do we have a recognized
5 property interest in a deceased body that Ms. Simkova can
6 claim? If she's not deprived of that property interest then
7 there's been no constitutional deprivation, and then there's
8 no issue about due process. The Third Circuit has not
9 addressed this question. And New Jersey has a very I think
10 confusing, it recognizes what has been called a quasi
11 property interest. Excuse me. That is a case Strachan, which
12 is in the briefs. But the Supreme Court calls that right a
13 dubious right. A quasi right, but it's dubious, because it's
14 really not a property right. It's really the feelings of the
15 victims-- the deceased family. And they said it really
16 should be called a wrongful infliction of mental distress, if
17 that right has been infringed.

18 So they call it a quasi property right. And of
19 course the due process clause, you're not allowed to take
20 life, liberty or property, without due process. So I will
21 argue that this is not a recognized property right
22 constitutionally. To say that police have a constitutional
23 argument to contact relatives is a unwarranted expansion of
24 the recognized due process property rights. That would be my
25 argument. And that is, I think, a conclusion that is really

1 was addressed by-- in the Thompson district court case--
2 Judge Pisano.

3 But let's assume for the purpose of this motion
4 that there is such a property right, then we have to get
5 into, well, is due process owed and if due process is not
6 provided what standard do we have to gauge the violation of
7 that right? And for a substantive due process right I think
8 the standard is government action that shocks the
9 conscience. And long ago, 20 years ago, the Supreme Court in
10 the Daniels case said that, due process is not implicated by
11 a negligent act. You have to have recklessness: A
12 deliberate decision to deprive someone of their property.
13 And even if you recognize, your Honor, a property right, I
14 think I can safely and clearly say that is where this case
15 really falls. Because you do not have deliberate government
16 action in this case to deprive Ms. Simkova of any right
17 whatsoever. You just do not have the deliberate, knowing,
18 non-negligent action.

19 The plaintiff's may argue that the City police
20 officers or-- were-- should have done this. Should have done
21 that. But we know, again, we know that the City tried to
22 locate Mr. Simko. And they called in to Virginia Beach.
23 Maybe they should have done something else. Maybe not. But
24 that's negligence. So when your Honor said we're not talking
25 about negligence, I didn't want to stand up. But I think the

1 allegations here only amount to negligence at best. And that
2 would not be an affront to the due process clause under the
3 U.S. Supreme Court standard.

4 So even if the plaintiff were able to state a claim
5 that the City conducted a faulty investigation or
6 insufficient investigation, that wouldn't shock the
7 conscience. And, again, we know that there was no missing
8 person's report that was filed when the City found the
9 deceased person. So that's the due process aspect.

10 There are two other claims that I'm only going to
11 address momentarily. There's the Cemetery Act count, which
12 is the New Jersey Statute 45:27. And I think it's quite
13 clear, as Judge Pisano said in the Thompson case, that it
14 does not apply to public entities. And I'm not going to
15 repeat the arguments in the moving papers. It was pointed
16 out by Mr. DeFuria that there's a appellate division called
17 Lascurain v. the City of Newark, which is a case involving a
18 grave yard that was lost in time. And they said in that
19 case, the Cemetery Act does not apply.

20 The Patricia's law, I'm not going over that. It
21 was enacted eight months after this person was discovered.
22 So I don't know how that could--

23 THE COURT: Well, I think that plaintiff's counsel
24 was pretty clear about how it affects it. At least that's
25 what I drew from it. He doesn't specifically plead a

1 violation of it. He doesn't get into the weeds about whether
2 there is a prior cause of action created by it. He says, I
3 think, hey, this was remedial legislature put into effect and
4 this is the way things should have been. They clearly
5 weren't. And to the extent that there is this legislative
6 recognition, you, Judge, can accept what we're saying which
7 is this was bad. And-- and we want constitutional redress--
8 am I right about that, counsel?

9 MR. BRISKIN: That's correct, your Honor. Yes.

10 THE COURT: So when you say, I don't know why they
11 put it in, I think we all know why they put it in. It's
12 advocacy and it tends to put legs under their argument.

13 MR. LIPSHUTZ: I know we're not here to address any
14 qualified immunity issue, which of course would be important,
15 because before you could have a Monell claim against a public
16 entity, you have to prove that there has been a
17 constitutional violation in the first place. We're not
18 there. But I don't, even on a qualified immunity analyses, I
19 don't see how a reasonably competent officer in November of
20 2007 should have been guided by law that was passed-- enacted
21 eight months later. I don't think that that-- I don't see
22 how that works. I don't know how you would get a reasonably
23 competent officer and say, and I think that's clear qualified
24 immunity, it doesn't work that way. I know your Honor is
25 familiar with that.

1 THE COURT: Yes.

2 MR. LIPSHUTZ: And finally, there's this free
3 exercise clause claim and I don't really think it was
4 addressed in opposition to the motion very deeply. Just not
5 allowing someone to file a missing persons report, not
6 conducting an adequate investigation. And I think there is
7 an issue about postings in Penn Station. That's not the kind
8 of restraints on religion that causes-- addresses-- is
9 addressed to. It doesn't really affect her religious
10 sensibilities. Sort of trying to pigeonhole that back. But
11 the cases are quite clear that I set forth in the brief. You
12 have to have governmental conduct with some motivation
13 related to her religion. I just don't see how it's pled at
14 all.

15 THE COURT: Well, what is pled is that she was
16 denied the right to put up posters. That happened. How do
17 you justify-- do you say, well, that's just another example
18 of they could have done things differently. They could have
19 done more. They could have done less. This is something
20 they did do that doesn't look good. But even accepting that
21 they did it and that it bespeaks an attitude about how far
22 they were going to go in terms of backing up a private
23 investigation, it still doesn't rise to the level of what
24 they had to do. Or a level of Constitutional inaction or
25 action that comes under a 1983 successfully pleaded case.

1 MR. LIPSHUTZ: Well, I agree with you. But I just
2 don't even see it being a religious exercise here. I don't
3 see any action by the city.

4 THE COURT: Take out the religious exercise, let's
5 say I go your way and the Third Circuit is looking at it and
6 they go, yeah, well, that was kind of-- they make a mistake
7 about whether he's alive, or telling her that he's alive.
8 They actually at the same time are investigating his death
9 down in Virginia Beach. They released the body. They know
10 that there is somebody wandering around wanting to put up
11 fliers about her son. Hey--

12 MR. LIPSHUTZ: It's not clear-- it's not clear that
13 there's a connection between Ms. Simkova, who is trying to
14 put up fliers about her son and. I don't see that connection
15 here. I just don't. Because you've got to remember--

16 THE COURT: Well, remember it's not just your
17 sensibility, it's whether or not a reasonable inference can
18 be drawn.

19 MR. LIPSHUTZ: I understand that. But she says
20 that she came on December 30th, the day after she filed a
21 missing persons report in New York. It's not clear at all
22 what New York has done. It's not clear at all. To say, what
23 is New York done-- no one knows. I mean, I don't know how
24 you tie-- not you, your Honor. There's no tie between coming
25 on the 30th and saying, we want to file a missing persons

1 report, but you're already filed one in New York there where
2 he lives and that's the entity. You don't have two entities
3 doing missing persons, your Honor, you have one. Otherwise
4 you have two investigations-- don't work that way. You make
5 a report and that entity is responsible for the
6 investigation. It's not like you file one in every town.
7 You have one. So New York is doing the investigation, Newark
8 is not.

9 So I just don't see the tie between posters and a
10 constitutional deprivation under the free exercise of religion
11 clause. I don't know if there's another constitutional claim
12 with respect to posters that are not-- you're not allowed to
13 put up. But I don't see that is a free exercise and that's
14 what's pled in this complaint.

15 So some miscellaneous items. There was no tort
16 claim notice filed, which I think is acknowledged. So it's
17 never been filed. So to the extent--

18 THE COURT: When would it have been timely given
19 the evolution of events? Would it have had to have been
20 within the prescribed time after the New York police officer
21 informed her and she confirmed that, in fact, her boy had
22 been buried?

23 MR. LIPSHUTZ: I would agree that the discovery
24 rule would tolled until that time, at which time she would
25 have-- let's be generous and say, it's the time that she

1 learned that her son was wrongfully buried let's say.

2 THE COURT: Okay.

3 MR. LIPSHUTZ: Then I'm trying to be generous. She
4 would have 90 days statutorily to file a claim. We're up to
5 one year to show exceptional or extraordinary circumstances.
6 But in any event, you just can't file a complaint. That's
7 not a notice of claim. That is not-- that doesn't comply
8 with the statute. So she would have had up to a year to file
9 that motion, but she didn't and she filed a complaint. And
10 it's been well over a year. And according to the Tort Claims
11 Act, state court judges don't have authority to extend that
12 period after one year that that's the cutoff.

13 THE COURT: Now, does that mean that she's pretty
14 much foreclosed from getting any redress for negligent
15 actions by anybody?

16 MR. LIPSHUTZ: A tricky question. State law
17 claims--

18 THE COURT: I asked it.

19 MR. LIPSHUTZ: I argued earlier that the best she
20 could show is negligence with respect to the City of Newark--
21 with respect to the investigation. And I argued that
22 negligence is not sufficient for a due process violation. So
23 tricky question. For a state law claim, she's precluded
24 under any theory of conduct, negligence, wilful misconduct--
25 anything-- she's precluded. It's just done.

1 Finally, I put in the motion to dismiss the count--
2 the aspect of punitive damages dismissed upon a public
3 entity. I'm not revisiting that. That's pretty much
4 standard, no punitives against public entities.

5 THE COURT: Let me just probe a little bit
6 further. Are you saying that to the extent that we have Ms.
7 Simkova cornered by a rejection of any constitutional
8 wrongdoing by anybody in the world with respect to this, or
9 any of the named defendants; you're saying that somewhere
10 there's a lingering whiff of negligence that could be flogged
11 into life in federal but not in state court because of the
12 Tort Claims Act?

13 MR. LIPSHUTZ: Well, I think it would be denied in
14 federal court because of the Tort Claims Act. I'm sorry.

15 Assume for a minute, your Honor, that your Honor
16 dismissed the constitutional claims. And you said, you know
17 what, I don't want to deal with the state law claims-- I'll
18 remand it back to the state.

19 THE COURT: That's right.

20 MR. LIPSHUTZ: They had a process in state court.
21 They have a process, a remedy in state court that they could
22 have asserted, within the statutory Tort Claims Act period.

23 The fact that that remedy is no longer available to
24 them because of their failure to file a tort claim notice,
25 it's irrelevant, but they had a remedy that through no fault

1 of the City of Newark or Garfield or the medical examiner,
2 that's gone, but they had that remedy.

3 I think may be that-- does that answer your Honor's
4 question?

5 THE COURT: Yes, it does.

6 MR. LIPSHUTZ: So even if you wanted to consider
7 that as a part of the due process that they would have been
8 entitled to, to remedy this property interest, they had that
9 remedy. But-- it's like if they didn't file it within two
10 years let's just say, right. Statute of limitations. They
11 had a remedy but didn't file it.

12 THE COURT: Okay.

13 MR. LIPSHUTZ: Does, your Honor, have any other
14 questions that I could address?

15 THE COURT: Not right now, but if I think of
16 anything tricky I will bring you back up.

17 MR. LIPSHUTZ: Thank you, your Honor.

18 THE COURT: Mr. Murphy. Now, one of the arguments
19 made in the opposition is that your entity is not entitled to
20 immunity that you claim. And there weren't any reply briefs
21 filed and so I was curious how you respond.

22 MR. MURPHY: I'm sorry, your Honor, but there was a
23 reply brief filed.

24 THE COURT: There was-- I apologize-- I didn't see
25 it. Okay.

1 MR. MURPHY: There was, and we attached a
2 certification from the Medical Examiner's office as well.

3 THE COURT: Okay, tell me about that.

4 MR. MURPHY: So that our moving papers relied on
5 the fact that the state, I'm sorry, I always get this wrong.
6 The Office of New Jersey State Medical Examiner is an entity
7 which is created within the Division of Criminal Justice
8 within the Department of Law, under the auspice of the Office
9 of the Attorney General, which is under the Executive Branch
10 of the State of New Jersey.

11 Counsel raised the argument that because these
12 counties, Essex and I don't remember the others that were
13 involved, have elected not to have their own county medical
14 examiners and their medical examiner's services therefore
15 provided by the Office of the New Jersey State Medical
16 Examiner, that it was really more of a Monell claim that was
17 really a claim against the counties.

18 In response we provided a certification, which we
19 believe satisfies the factors, which says that the employees
20 are employed in the northern medical examiner's office are
21 state employees. They are a mutual medical examiner. If you
22 look at the statute which allows the medical examiner to take
23 over when counties decide not to have a medical examiner, it
24 says that the state medical examiner shall designate one of
25 his assistants to perform the duties of the office. It

1 further allows that that assistant may appoint employees or
2 personnel to aid investigators as they deem necessary. They
3 are all state employees and they're all serving under the
4 Office of the Medical Examiner. And any claims which would
5 be paid for that report would be paid from the state tort
6 claims fund. Would not be reimbursed by the counties. The
7 counties do pay for the services provided-- there is some
8 kind of an arrangement-- it's like a per body process fee
9 that the counties do pay the medical examiner to do those
10 duties. But it is still the state acting state employees.

11 THE COURT: This is yet another, we should go on
12 the Steve Kornacki show on a Saturday and Sunday morning,
13 that get up and talk about the vagaries of the New Jersey
14 government. There is more government per square inch than
15 any place on the planet. This is another example of it,
16 right?

17 MR. MURPHY: That's correct, your Honor.

18 THE COURT: Okay. The argument then is that you
19 just can't be sued, is that correct?

20 MR. MURPHY: Yes, the Eleventh Amendment.

21 THE COURT: Right. Now, to the extent then that
22 the medical examiner and his employee that began this
23 discussion with everybody about haven't really been
24 individualized for purposes of service or motion practice,
25 I'm assuming this same argument that you're making would

1 cover them; is that correct?

2 MR. MURPHY: It would cover them in their official
3 capacities. If they were served, it would also be making a
4 qualified immunity argument on their behalf, there is
5 parenthetically evidence that office posted an ad in the Star
6 Ledger for three days, advertising that Michael Simkova's
7 body was at the Northern Regional's office and asking for
8 information regarding next of kin. They also sent a letter
9 to the Newark PD, as turns out I think about six weeks before
10 the body was released saying, we're planning on releasing
11 this body, let us know if we need more time.

12 So we think that that would meet the constitutional
13 requirements.

14 THE COURT: All right. Thank you very much.
15 Counsel.

16 MR. BRISKIN: Thank you, your Honor.

17 THE COURT: And you can address your adversary's
18 arguments is whatever order that pleases you.

19 MR. BRISKIN: Thank you, your Honor. First I'll go
20 with the state since it's the last and kind of little
21 limited.

22 THE COURT: Yes.

23 MR. BRISKIN: I think there are really two
24 arguments here. It's not just the Eleventh Amendment.
25 There's a statute that was in effect at the time of the

1 events in this case, which is the New Jersey Cemetery Act.
2 And that is Cemetery Act expressly provides for damages,
3 okay, for violation of that act. And the violation lies in
4 the authorization to bury a body. And there's a hierarchy
5 outlined as to who has the right to make that decision. How
6 that body to be buried. Where that body is to be buried.
7 And that hierarchy starts out with next of kin. In this case
8 we know for a fact that it wasn't the next of kin that buried
9 the body.

10 Now, who can be held liable for damages-- any
11 person. Now, a person is also defined in that statute. And
12 a person is quite literally defined as, other than
13 individual, corporation, partnership, association, or any
14 other public or private entity. That statute also-- the
15 Cemetery Act doesn't have any notice requirement.

16 So that's kind of a my first claim against the
17 state. As to why the regional Medical Examiner's Office as a
18 public entity, whether it is northern regional examiner or
19 the state medical examiner's office may be held liable in
20 this case. For their, you know, because they're the ones
21 and, again, if we're going to talk about some of the
22 evidence-- are the ones that released the body for burial to
23 a contracted private company, Eternity Funeral, who is not
24 making a motion to dismiss here. Which ultimately led the
25 body to be placed into the ground in a box.

1 The second argument is, is the exception to the
2 Eleventh Amendment of sovereign immunity. And the test,
3 okay, is where the issue arises. And the test is really, we
4 believe this is that a northern regional examiner's officer
5 acting as a non municipal corporation. And there are two of
6 these regional medical examiner's offices in the State of New
7 Jersey.

8 THE COURT: Well, what do you do with the
9 certifications that you got?

10 MR. BRISKIN: Well, I don't think should be
11 considered because it's submitted in a reply. It's a
12 self-serving certification. Making conclusory statements as
13 to the source of funds. I mean, we can understand, yes maybe
14 the check for damage may be paid by the state. But the state
15 could say, hey, you four counties Hudson, Essex, Somerset and
16 Passaic, who are responsible by statute all costs
17 unqualified. For the budget for next year you have to put in
18 another X amount of dollars to cover the liability because
19 that's one of the costs. Because the situation hasn't arisen
20 yet doesn't mean that the state is not going to say, hey,
21 this, you know, a cost of any business is liability. And if
22 you're going to budget for the next year and somebody else is
23 paying you for that you have to collect money for that, you
24 have to collect that cost of liability.

25 THE COURT: Well, let's jump all over that for the

1 moment. And let's get beyond the time and wrangling about
2 whether or not that applies and jump into exactly what you're
3 saying the ME did wrong. Okay. What-- because trying to
4 pierce the veil of all of this immunity stuff and getting to
5 the facts may be unnecessary, if, in fact, immunity is
6 applied. But I'm curious as to what Ms. Simkova says the ME
7 was supposed to do right. And that kind of allows you to
8 talk about your Cemetery Act issue. You're saying that they
9 took away her rights to the person to whom the person was to
10 be released, correct?

11 MR. BRISKIN: I didn't understand the ME?

12 THE COURT: Yes. I mean, to the extent that you're
13 saying the Cemetery Act applies, to the extent that you're
14 saying bad things were done by Mr. Murphy's client-- what?
15 What did they do? What should they have done?

16 MR. BRISKIN: Well, the facts that we have here is
17 that there is Mr. Uricolli or Det. Uricolli who it appears is
18 employed by the Medical Examiner's Office. And he did some
19 sort of investigation, and as a matter of fact what I got
20 yesterday which I perused, revealed that he spoke to the
21 owner of the funeral home where Mr. Simko was found and he
22 got some information from them. He was told that, oh, we
23 know this face. He's been here-- I think it was two times a
24 week and, you know, for whatever he was doing. Okay. Other
25 than that they had the body. They took from my understanding

1 the evidence. And the evidence is not-- it's not that he was
2 just found without ID. He was found with two cellphones on
3 him. I could get into a lot of things where, you know, to
4 oppose Mr. Lipshutz's argument that all he sees is
5 negligence. Because I think anybody with a little bit of
6 knowledge about the internet and how to use a cellphone could
7 have done a lot more and discovered family that lived 14
8 miles away. But that's getting a little bit off topic.

9 So being they had somebody that was involved in
10 some sort of investigation, there seems to be a disconnect
11 here, between all of these public entities which are here to
12 serve the citizens. You know, who is supposed to do the
13 investigation in this event? And that's, you know, part of
14 why we cited to Patricia's law. Because I don't think that
15 the Medical Examiner's Office needed to do and what they had
16 to rely upon and what Newark PD knew. And I don't know if
17 Newark PD didn't know or didn't care.

18 So I think that's why the Medical Examiner's Office
19 is involved. And, yes, we have these facts that it went to
20 the Newark PD, hey, have you done anything? We have eight
21 months of the body laying here. Eight months. You're not
22 talking about two weeks or one week or eight weeks it's eight
23 months. And-- and, you know, that Det. Uricolli, I don't
24 know if there is anything else on any of other individuals or
25 any other facts that would put more-- allow more credence to

1 the fact that the Medical Examiner's Office was involved in
2 the investigation itself.

3 So that's why I think they should remain in this
4 case at this point.

5 THE COURT: Okay. Thank you. Moving on to the
6 other points.

7 MR. BRISKIN: Okay. Garfield next. To follow
8 along the analogy. We're looking at this through a lens.
9 And this is a movie and we have scenes and actors and theme.
10 One scene, one actor in a movie can play a pivotal role,
11 okay. And I think your Honor phrased it, hit the nail on the
12 head that had they taken the report. And that's the
13 allegation that they failed to take the report. They said,
14 hey, we're not doing this, he's from New York, go to New
15 York, let them deal with it. I don't want to deal with it.
16 So you live here, okay, that's fine. He was missing at that
17 point, you know, for several days. They were notified that
18 she was there. He was coming to visit her in Garfield. And
19 they chose not to take the report. We don't know what New
20 York did and that's not an issue in this case.

21 But, had they taken the report, the allegations
22 that that report should have been entered into, I believe
23 there are two national data bases here for missing persons.
24 Had they taken the report and had Newark done the right thing
25 or the Medical Examiner's Office it would have triggered a

1 match. Okay. So that's where, you know, you would be
2 getting the-- the fault lies. Not taking the report. And we
3 don't know if they had a policy, or if they didn't have a
4 policy, if they were trained or if they were not trained.
5 The allegation that she came and she spoke to an officer,
6 yes, it was one event, one conversation. But they had the
7 choice, okay. Or maybe they didn't have the choice. I don't
8 know what it was. But without further discovery we'll never
9 know. And whether or not they contributed to-- or whether or
10 not that's a deliberate indifference.

11 THE COURT: Why isn't New York sued then because
12 they did file a police report, I mean a missing persons
13 report and they-- didn't they have the same obligation with
14 the report that this was filed with them?

15 MR. BRISKIN: Well, the communications to my client
16 to New York were frequent and regular. Did not give her any
17 indication that they dropped the ball anywhere. If we still
18 have time to join them in this action, which I believe we do,
19 if discovery reveals or indicates, hey, we need to get them
20 in as well. Because our argument, and we repeat this theme,
21 is that setting the wheels in motion, you know. This was not
22 a one act. I think we have multiple culpable parties here.
23 And their actions in total is what caused and was a
24 deliberate indifference to her rights. I think--

25 THE COURT: Well, culpable how though? Culpable

1 constitutionally or culpable in terms of negligence?

2 MR. BRISKIN: I think culpable constitutionally,
3 your Honor. I think that the argument there that she doesn't
4 a property right is, I don't see any basis for it. There's
5 80 years of law in the State of New Jersey saying that
6 there's a property right in the body of the deceased by the
7 next of kin.

8 Now, and as a matter of fact that law has been
9 honed down-- has been honed down to where we get to
10 Lascurain. And Lascurain had to do with improper maintenance
11 of a burial site. Miss Lascurain, I believe it was her
12 father who was, you know, originally he may have been
13 estranged, she didn't really have any connection with him,
14 and who is also buried in a Potter's field. And what they
15 did was that they narrowed the law down and said, you do have
16 a property right, but it doesn't extend passed the point of
17 burial. The property right is in the body of the deceased
18 and exists from the time of death until the time of burial
19 and in this case it was eight months. Okay.

20 So the argument is that it was Ms. Simkova's
21 property right. She was deprived of her right to bury him
22 for eight months. Yes, that property right cuts off once he
23 was put in the ground. But for eight months three players at
24 minimum that were involved in that deprivation. And if we go
25 to-- some of the cases I think are a little, you know,

1 they're not applicable here. If you look at Gazette, and if
2 you look at DeShaney, which are cases cited over and over by
3 all counsel. And I think-- well, what happened there was a
4 third party actor, okay, who deprived the due process right.
5 Meaning either the life or liberty. DeShaney, the child was
6 returned to the father, who ultimately beat him until he
7 became, you know, mentally incapacitated.

8 In Gazette, you're talking about a third person, an
9 individual who took this woman, you know, I believe sexually
10 abused and put her in a trunk of a car and then she ended up
11 dying. Eggregiousness, I don't think as egregious here in the
12 police conduct in lying about an investigation. Here the
13 body, the right, the property right was in the possession of
14 a public entity. And that's the medical Examiner's Office.
15 They had-- if you want to say custody, possession, physical
16 possession, they had physical possession. And the Newark PD
17 had possession over the investigation. And they have the
18 most-- I mean if we look at the records, and right now the
19 file is missing or whatever it is. They had the most
20 investigation. I think they have 5 or 6, 7 officers involved
21 here-- detectives. All of which in my opinion did nothing.
22 It wasn't negligence. This was a deliberate indifference to
23 her rights. Because as we know police have resources. And
24 my belief honestly is that resources were not all allocated
25 to this, whether it be in training, education, custom,

1 policy, because this doesn't help-- or this doesn't make
2 reductions in crime. This doesn't make statistics.

3 THE COURT: Well someone-- one of the moving briefs
4 there are two references.

5 In the brief filed by the City of Newark, on page
6 18, the argument is made in the last full paragraph. "The
7 real problem alleged by the plaintiff is not that the City
8 interfered with the rights as a parent to bury her son,
9 rather it is that the City did not assist her."

10 And in the brief filed on behalf of the City of
11 Garfield and the Garfield Police Department on page 10, the
12 statement "the free exercise clause only limits the
13 government's active interference with the free exercise of
14 religion and does not require that government's active
15 protection of an individual's religious rights."

16 Both statements, albeit in different contexts,
17 appear to be saying that there is a line that the law
18 recognizes. And on one side of that line is active and
19 deliberate interference with the known rights. And on the
20 other side of that line is a nonstarter i.e. whether you want
21 to call it negligence or a neutrality, or a limp-wristed
22 response, or even a confused or mistaken response, but not
23 actionable. And I believe all of the defendants are lining
24 up on that side of the line. And so I really need from you
25 where they-- if you agree with that. Where they actively

1 interfered with, you know, in a manner that would cross the
2 constitutionally appropriate line, because it was deliberate
3 indifference to a known constitutional right, or it was a
4 state actor doing something to an individual liberty that
5 calls into play due process.

6 MR. BRISKIN: Well, I think, your Honor, the fact
7 that he was in their possession, okay, is the active
8 interference. If they didn't find him and if all we are here
9 for was that they didn't take a report from her and, you
10 know, he wasn't in their possession for eight months and
11 actively investigated. The report even says active pending.
12 I never saw a closed report in that investigation. I think
13 that is the active. That's the action. And the action-- and
14 the argument against Garfield, they didn't have this body,
15 you know, they weren't part and parcel of picking him up-- we
16 all know Newark doesn't store bodies in their police
17 departments. It has to go to a Medical Examiner's Office and
18 the morgue. But Garfield, you know, they were also a
19 parallel police department. They worked together throughout
20 the state. They had the body.

21 So I think it's a little easier to find the
22 activity between Newark, and the Medical Examiner's may be a
23 little bit more difficult to charge with. But I'm going to be
24 arguing that in the same vein they were active in their
25 involvement because the body was in possession of a parallel

1 police department. And the investigation of the body was in
2 a parallel police department, the body was in the State
3 Medical Examiner's Office.

4 THE COURT: Okay.

5 MR. BRISKIN: A couple of other things that I
6 wanted to point out, your Honor.

7 Mr. Lipshutz had talked about the case of Canton.

8 THE COURT: Yes.

9 MR. BRISKIN: That case was actually remanded for a
10 hearing, on a factual issue on whether or not the conduct
11 arose to deliberate indifference. And that was where the
12 woman was taken into custody and fell down twice in the
13 police station, they said, hey, let her go. They didn't do
14 anything. Then it turns out that the authority had a
15 decision for medical treatment vested in the police when the
16 person is in their custody. And does have an act or a
17 non-act. They let her out. And then her family took her in
18 an ambulance and got her to a hospital and she suffered--

19 THE COURT: Wait, but aren't we back now to the
20 failure to train issue?

21 MR. BRISKIN: Right. And they had to address
22 whether or not it was an action or not.

23 THE COURT: Well, let me ask you something. Is
24 every case and law is made, and I'm not talking about making
25 law. But laws are interpreted on individual fact scenarios.

1 And if you were sitting next to somebody outside a gate of
2 103 in Newark airport and just decided to chat up what you
3 did for a living and without giving names you told somebody
4 sitting next to you about the facts of this particular case,
5 no doubt somebody would be horrified and say, wow, that's
6 horrible. And that's worse than my sitting for the rest of
7 the plane ride and kind of pestering you and saying, well,
8 who is the bad guy here? And you might say, you know what,
9 everybody is a bad guy. If you think about it-- this is one
10 of these real perfect storms of bad guys.

11 Now, are we saying that everybody's individual,
12 whether it's inaction, mistake, poor procedure that was
13 tightened up with the passage of Patricia's law-- whatever.
14 When something goes this afoul are you saying that the
15 Constitution should give someone a remedy because you can't
16 dispose of our own next of kin, we can't do our own
17 investigations. And, therefore, there's a collective
18 responsibility that kind of overrides all of these precious
19 arguments that your adversaries are making?

20 MR. BRISKIN: Well--

21 THE COURT: Is that what you want to argue to me?

22 MR. BRISKIN: Yes. I believe that's correct, your
23 Honor. And, you know, I think the statute also applies to
24 all of the defendants. I think they all played a role. But,
25 yes, I do believe that, you know, the Constitution should

1 provide a remedy for that because we have the property
2 interest, okay. And she was deprived of her right. You
3 know, she-- and that's where, you know, the religion ties in
4 you know.

5 That violation was not really a not being allowed
6 to place posters. It was her religious believes, you know,
7 by burying him and as we learned today there was no type of a
8 religious burial. We know that now after the deposition of
9 Mr. Booker who is, you know, owner of Eternity Funeral
10 Services. You know, death and birth, you know, in life as
11 far as we know is quite important as far as religion goes.
12 There are certain rituals within the religions. And
13 certain--

14 THE COURT: Well, isn't that part of the fallout of
15 this? Isn't the amount of time that things started to go
16 wrong fairly short? And couldn't there have been points at
17 which this thing didn't have to go as wrong? I think we can
18 agree. But the issue is, is every bad outcome have with it
19 under our system of justice the consolation price of a
20 lawsuit. Does every failure find the murderer entitled a
21 victim's family to sue because the police didn't do the job
22 that they could have done? I mean, that's where, you know,
23 in the long run we're all kind of wrestling with what does
24 the law do for us under our Constitution. Under the Tort
25 Claims Act, Mr. Lipshutz said, you might have a much easier

1 go. Because you could point to a number of places and people
2 who could have done more and make the argument that they
3 should have done more and maybe get a jury to agree with
4 you. But we're talking now about our Constitution, and the
5 enormously elastic, but still structured, rights we have
6 under the title of due process.

7 And I ask you that because when you were fashioning
8 this complaint, and it's a nice lucid complaint, you give the
9 reader what he or she needs to understand what happened. You
10 had to be hitting the books and really searching your legal
11 knowledge for theories, theories of why she deserves redress,
12 right?

13 MR. BRISKIN: That's correct, your Honor. And I
14 think that example that you brought up is a person whose, you
15 know, child's been killed and the killer has not been found
16 and have a cause of action and should the Constitution
17 provide them with a consolation prize so to say?

18 THE COURT: Yes.

19 MR. BRISKIN: I haven't researched that issue. But
20 what I do know here is that there is a property interest.
21 Before you can even get to the question of whether or not
22 they look at the conduct of the police, should they have done
23 more of an investigation, less, or a different
24 investigation. First you have to have the property
25 interests. And I think it's clear in this case that when she

1 was deprived of her right to his body and to direct his
2 funeral and bury him where she could bury him, where she
3 could about visit him in the religious manner consistent with
4 their beliefs-- was she deprived of that, yes. I think there
5 is absolutely grounds for remedy under the Constitution.

6 THE COURT: Okay. Fair enough. Fair enough.

7 MR. BRISKIN: Thank you.

8 THE COURT: Anything from the movants?

9 MR. DEFURIA: I have two quick statements and then
10 I'm finished very little.

11 MR. LIPSHUTZ: And myself very little.

12 THE COURT: I thought you will stand up and say
13 nothing.

14 MR. LIPSHUTZ: Yes.

15 MR. DEFURIA: Judge, two things said by Mr.
16 Briskin. First of all, it is the first time that I ever
17 heard anyone argue that the City of Garfield, Garfield Police
18 Department somehow is a parallel unit or a parallel
19 department to anybody else in this case. And that the City
20 of Newark Police Department's custodial possession of the
21 body is somehow giving possession to Garfield. We didn't
22 even know who the person was. We had no information. We
23 didn't get a fax or a letter from any other entity saying, we
24 found Mr. Simko, can you help us, we don't have anything.

25 So to the extent that we would anyhow share in any

1 liability potentially for having possession of a body by
2 another police department I don't believe there is any
3 support for that.

4 I think this is really a negligence case, Judge. I
5 think the more we talk about it the more we all-- what should
6 have been done or should not have been done, the more the
7 trial lawyer in me keeps feeling about a negligence case.
8 And that's what I keep feeling. And I want to point to page
9 3 of my reply brief, Judge. Where I block cite to the
10 language in the City of Canton case.

11 And in that case the Supreme Court of the United
12 States addressed the high standard of fault and causation
13 that they were enunciating when they were describing the
14 deliberate indifference standard, so as to not open
15 municipality to unprecedented liability under Section 1983.
16 There the court said, to adopt a lesser standard of fault in
17 causation would open municipalities to unprecedented
18 liability under Section 1983. In virtually every instance
19 where a person has had his or her constitutional rights
20 violated by a city employee, a 1983 plaintiff would be able
21 to point to something the city could have done to prevent the
22 unfortunate incident. Thus, permitting cases against cities
23 for their failure to train employees to go forth under 1983
24 on a lesser standard of fault would result in de facto
25 respondeat superiority liability on municipality, a result we

1 already rejected in the Monell case. It would also engage
2 the federal courts in an endless exercise of second guessing
3 municipal employee training programs. This is an exercise
4 that we believe that federal courts are ill-suited to
5 undertake and as one that implicates serious question of
6 federal case.

7 The reason I read that aloud, Judge, is exactly
8 what we're doing. We're trying to say, okay, what did
9 everybody do wrong or what could they have done better?
10 That's not what we should be looking at and that's not what
11 the Canton court wanted it to happen when it said, no, we
12 need deliberate indifference, not negligence, not
13 recklessness, not willful conduct-- deliberate indifference.
14 And I don't believe that's here, Judge.

15 MR. BRISKIN: May I just respond to that, Judge?

16 THE COURT: Sure.

17 MR. BRISKIN: Your Honor, I don't disagree with
18 that position as far as the standard is concerned. I think
19 that the court says, hey, you're right, it's not negligence.
20 Okay. And there's a question of fact here, you know, the
21 level-- okay of conduct is a question of fact. We're not
22 here for summary judgment motion. We're here for a 12(b)(6)
23 motion to dismiss. Have I, as my client alleged, the
24 necessary facts to go forward in this case. I think we
25 have. I think that it's necessary to explore the procedures,

1 their policies, their training and their customs, to
2 ascertain and be able to put forth a case. Okay. And let,
3 you know, a jury decide whether or not their actions or
4 inactions, or whatever they had going on rose to the level of
5 deliberate indifference. And that's exactly what the end
6 result of Canton was. It was remanded for that purpose.

7 THE COURT: And they being Garfield and Newark and
8 the ME's office?

9 MR. BRISKIN: At this juncture, I think if that's
10 how this motion will be decided, I think without a doubt it
11 has to go forward.

12 THE COURT: Fair enough. Let's see, Mr. Lipshutz,
13 you have one last point to make.

14 MR. LIPSHUTZ: Oh, a couple, your Honor,
15 respectfully.

16 THE COURT: Or 17 long--

17 MR. LIPSHUTZ: Your Honor, I really didn't talk
18 about deliberate indifference-- Mr. DeFuria did. But it
19 struck me when I was listening to the argument, who is being
20 deliberately indifferent to Ms. Simkova? The City of Newark
21 is investigating a John Doe. They don't know of her and her
22 existence until after seven days. And-- and it's unclear how
23 they connect it.

24 When you talk about deliberate indifference, what
25 they really are saying is, what they're really saying, your

1 Honor is in every missing persons case, where the police
2 department does a crappy job of investigating, a negligent
3 job of investigating for a missing person, a John Doe,
4 identify, in every case you owe a duty under the Constitution
5 to contact the family. And if you don't do it you've
6 committed a constitutional deprivation.

7 THE COURT: By contact the family you mean find who
8 the person is--

9 MR. LIPSHUTZ: Right. If you do a lousy job of
10 investigating in missing persons, in every John Doe that is
11 discovered you will be probed into your investigation in a
12 Constitutional sense, I don't think that that's what due
13 process means.

14 In the U.S. Supreme Court case and this is what
15 struck me. Daniels versus Williams from 1986. I'm sure your
16 Honor is familiar with it. A prison gentleman fell on a
17 pillow, okay, that was negligently left there. He didn't
18 have a state law remedy, because the state had immunities--
19 sounds familiar. He sued for due process. And the Supreme
20 Court said, to hold the injury caused by such negligent
21 conduct is a deprivation within the meaning of the Fourteenth
22 Amendment, would trivialize the century-old principle of due
23 process law. Negligent conduct, a crappy investigation, a
24 lousy investigation, is not deliberate indifference-- it's
25 negligence. This is a negligence case. That's all I have.

1 THE COURT: Thank you.

2 MR. BRISKIN: Your Honor, may I respond?

3 THE COURT: Sure.

4 MR. BRISKIN: I think what Mr. Lipshutz was trying
5 to allude to was a floodgates argument, slippery slope
6 arguments. We're not alleging that every person would have a
7 cause of action. I didn't take this case because I evaluated
8 every person. I evaluated the facts of this case. And our
9 position is that whatever they did, okay, I don't know,
10 pursuant to it as an education training or a procedure, but
11 it was worse than lousy. Okay. I think a high school
12 student with basic knowledge of the internet could have found
13 the parents; on a simple public record search was able to tie
14 the parents to him.

15 The only investigation that they did as far as we
16 know now since we're going into the facts, is to take the
17 fingerprints and match it to an arrest once in Virginia. And
18 as a matter of fact his father with the same exact name lives
19 in Virginia too-- so they stopped right there.

20 Your Honor, we need to get to the point of whether
21 or not this is negligence or deliberate indifference, and I
22 don't think we are there yet. And I think discovery as I
23 said previously has to be conducted. And at that point, if
24 they feel the same way that they do, in light of all of the
25 facts they can make a different type of a motion, in which,

1 you know, is there enough to let this go to a jury to decide
2 whether or not this is deliberate indifference or if it's
3 pure negligence.

4 I think that's all I have for your Honor.

5 THE COURT: Okay. The record should reflect that
6 this was a very good argument and that the briefs submitted
7 to the Court were well-reasoned and grammatical and cogent,
8 and I thank counsel for putting the Court to the task of
9 trying to apply these Constitutional principles to this
10 particular fact pattern.

11 I'm going to be writing a written decision. We
12 will try to get it out to you by the end of the month, so
13 thank you very much, counsel.

14 MR. BRISKIN: Thank you.

15 MR. LIPSHUTZ: Thank you.

16 MR. DEFURIA: Thank you.

17 MR. MURPHY: Thank you, your Honor.

18 THE COURT: Thank you.

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